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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WESTERN AIRLINES, INC.,
a Delaware corporation,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

Does federal law preempt state regulation of the form and content of an interstate air carrier's advertising of its rates, routes and services?

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PEOPLE OF THE STATE OF CALIFORNIA,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Petitioner, Western Airlines, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeal of the State of California, Fourth Appellate District, entered on May 8, 1984.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District (the "court of appeal"), reversing the judgment of the Superior Court of the State of California for the County of San Diego (the "superior court"), is reported in *People v. Western Airlines, Inc.*, 155 Cal.App.3d 597, 202 Cal.Rptr. 237 (1984), and is printed in Appendix "A."

JURISDICTION

The court of appeal issued its opinion reversing the judgment of the superior court on May 8, 1984. A Petition for Hearing in the Supreme Court of the State of California was timely filed on June 18, 1984, and was denied on July 26, 1984. The notice denying the petition for hearing is printed in Appendix "B." This petition for a writ of certiorari was filed within ninety (90) days of that date. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved are set forth in Appendix "C."

STATEMENT OF THE CASE

In October, 1982, the People of the State of California (hereinafter "People") filed a civil complaint against Western Airlines, Inc. (hereinafter "Western"), alleging violations of Sections 17200 and 17500 of the California Business and Professions Code for alleged deceptive and unfair advertising on three different advertising programs. Western demurred to the complaint

on the grounds that the People's action was preempted by the provisions of the Federal Aviation Act and Airline Deregulation Act of 1978 and encompassed matters within the primary jurisdiction of the Civil Aeronautics Board ("the CAB").

At various times in 1982, Western had placed three multi-media advertising programs which offered reduced round-trip fares when, as expressly specified in the advertisements, the customer purchased "round-trip full fare Coach or First Class Ticket[s] (Y) or (F) class only." The promotional fare was not available if a ticket from another class was purchased.

The complaint filed by the People asserted that each of the three advertising campaigns was in violation of state laws against deceptive and unfair advertising. In the first program, Western's written advertisements provided that the customer would receive a $100 round-trip ticket to Hawaii if he purchased any "full fare Coach (Y) or First Class (F or FN) round-trip ticket on any Western flight in the United States over 400 air miles one way." The second promotion offered round-trip tickets to anywhere Western flies in the continental United States or Alaska for $100, if the customer purchased any "full fare round-trip Coach (Y) or First Class (F or FN) ticket on any flight in the United States (except Hawaii). . . ." Finally, the third program again offered a round-trip ticket to Hawaii for $100 if the customer purchased any "round-trip full fare Coach or First Class ticket (Y or F class only) to anywhere Western Airlines flies in the United States, except Alaska. Your trip must be at least 300 air miles each way."

In an order dated April 1, 1983, the superior court held that the complaint was preempted by federal law and therefore sustained Western's demurrer without leave to amend and dismissed the action. On May 6, 1983, the People filed a Notice of Appeal from the judgment dismissing the action. In its decision filed on May 8, 1984, the court of appeal determined that federal law did not preempt state regulation of an interstate air carrier's allegedly

deceptive and unfair advertising of its rates, routes and services and reversed the judgment of the superior court.

REASONS FOR GRANTING THE WRIT

A. THE AIRLINE DEREGULATION ACT OF 1978 EXPRESSLY PREEMPTS STATE REGULATION "RELATING TO RATES, ROUTES OR SERVICES" OF AN INTERSTATE AIR CARRIER.

Interstate air commerce clearly and logically requires a uniform system of regulation. Recognizing this, Congress in 1958 enacted the Federal Aviation Act, contained at 49 U.S.C. §§ 1301, *et seq.*, to regulate air commerce and civil aeronautics for, among other things, the prevention of "unfair or deceptive practices." 49 U.S.C. § 1302(a)(3).

Prior to 1978, the Federal Aviation Act did not contain a specific preemption clause. However, decisions reviewing Congressional intent and the burden state regulation would place upon air commerce held that state regulation of interstate air commerce was in fact preempted by the Federal Aviation Act. *County of Cook v. Priester*, 22 Ill.App.3d 964, 318 N.E.2d 327 (1974) (weight of aircraft); *Village of Bensenville v. City of Chicago*, 16 Ill.App.3d 733, 306 N.E.2d 562 (1973) (noise and pollution).

With the Airline Deregulation Act of 1978, Congress specifically preempted state regulation of interstate air carriers, just as the federal government was itself deregulating the industry:

> (a) *Preemption.*
>
> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce

> any law, rule, regulation, standard, or other provision having the force and effect of law *relating to rates, routes, or services* of any air carrier having authority under Title IV of this Act [49 USCS §§ 1371 et seq.] to provide interstate air transportation. [Emphasis added.] 49 U.S.C. § 1305 (1984).

Except for the case at hand, the scope of the foregoing preemption clause has not been construed. However, an analogous preemption clause in the Employee Retirement Income Security Act of 1974 (ERISA), contained at 29 U.S.C. § 1001, *et seq.*, provides for the preemption of state laws which "relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). In *Shaw v. Delta Air Lines, Inc.*, ____ U.S. ____, 103 S.Ct. 2890, 2900 (1983), the language "relate to" as used in the ERISA preemption statute was broadly construed as follows: "A law 'relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."

The Attorney General of the State of California has asserted that the regulation of deceptive or misleading advertising by interstate air carriers falls within the state's police power. However, the express preemption clause and the pervasive nature of federal regulation in this area make it clear that state regulation must fall. *Cf. Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1980), where a New Jersey statute governing worker's compensation awards was held preempted by ERISA, despite the fact that worker's compensation (like the regulation of deceptive advertising) traditionally fell within the state's police power. In the case at hand, the State of California has sought to indirectly do what it cannot do directly -- regulate Western's rates, routes and services under the claim of deceptive advertising.

In reversing the decision of the superior court, the court of appeal concluded that state regulation of an air carrier's advertising of its rates, routes or services does not "relate to" those matters. Further, the lower appellate court determined that such regulation

of an interstate air carrier's advertising was authorized by the "savings" clause of 49 U.S.C. § 1506, and the decisions of *Nader v. Alleghany Airlines*, 426 U.S. 290 (1976) and *Brunwasser v. Trans World Airlines, Inc.*, 541 F.Supp. 1338 (W.D. Pa. 1982). However, these authorities are not well taken.

Section 1506 is nothing more than a standard savings clause, customarily tacked on to regulatory statutes. It was part of the Federal Aviation Act when it was adopted in 1958 and was neither mentioned nor specifically amended by the Airline Deregulation Act of 1978.[1] To the extent that it is inconsistent with the specific preemption clause of 49 U.S.C. § 1305 and the extensive regulations promulgated by the CAB, the savings clause is inapplicable.

The decision in *Nader* is not on point since it did not address the question of preemption of state regulation as to matters in the public interest. More importantly, *Nader* was decided in 1963 and was based upon the provisions of the Federal Aviation Act in effect *prior* to passage of the Airline Deregulation Act of 1978 and its express preemption clause. Accordingly, there was no express preemption clause to be construed by the Court. In fact, the Supreme Court in *Nader* expressly held that jurisdiction vested in the CAB to regulate deceptive practices in the public interest under Section 411 of the Federal Aviation Act (49 U.S.C. § 1381). The decision in *Brunwasser v. Trans World Airlines, Inc.*, 541 F.Supp. 1338 (W.D. Pa. 1982), is equally unpersuasive since the district court's limited discussion of preemption is itself dictum and did not include any mention, much less any analysis, of the preemption clause of the Airline Deregulation Act of 1978 or the extensive regulatory scheme established by the CAB concerning air carrier advertising and unfair or deceptive practices.

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[1] In its report to a Congressional subcommittee, the General Accounting Office ("GAO") noted the potential conflict inherent between the two statutes and the need for reconciliation of their provisions. GAO, *Legislation Needed to Clarify Future of Consumer Protection and Federal Preemption After the Civil Aeronautics Board Sunsets* (June 13, 1984) (Appendix I, at 7-8 and 20).

It is well settled that a preemption clause must be read "in its normal dictionary sense" as indicating a broad pre-emptive intent on the part of Congress. *Buczynski v. General Motors Corp.*, 616 F.2d 1238, 1250 (3d Cir. 1980), *aff'd on other grounds, Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1980); *Shaw v. Delta Air Lines, Inc.*, ____ U.S. ____, 103 S.Ct. 2890, 2900 (1983). As a part of the federal government's deregulation of the air carrier industry, Congress adopted a specific preemption clause which was intended to preclude the states from promulgating economic regulations "relating to rates, routes or services" of interstate air carriers. The wording, "relating to" rates, routes or services must lead to the conclusion that a state's efforts to control the content of an air carrier's advertising or the manner in which it advertises its rates, routes, and services falls within the preemption clause of Section 1305.[2] Such regulations most certainly "pertain to" and have a "bearing" upon rates, routes, and services. *Cf. Enders v. American Patent Search Co.*, 535 F.2d 1085, 1090 (9th Cir. 1976).

B. THE PERVASIVE SCOPE OF FEDERAL REGULATION OF INTERSTATE AIR CARRIERS PREEMPTS STATE REGULATION OF DECEPTIVE RATE ADVERTISING.

Any question concerning the constructin of the preemption provisions of 49 U.S.C. § 1305 should be resolved by a review of the structure of the Federal Aviation Act and Airline Deregulation Act of 1978, the pervasiveness of the regulations implementing those

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[2] Officers of both the Department of Transportation and Federal Trade Commission have indicated that the term "services" under the preemption statute includes both notice of terms of contract and unfair or deceptive practices. GAO, *Legislation Needed to Clarify Future of Consumer Protection and Federal Preemption After the Civil Aeronautics Board Sunsets* (June 13, 1984) (Appendix I, at 7).

statutes and the need for uniform regulation. The CAB[3] has been given specific jurisdiction under Section 411 of the Federal Aviation Act to control unfair and deceptive practices:

> (a) In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> * * *
>
> (3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers and foreign air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, . . .
>
> * * *
>
> (7) The prevention of unfair, deceptive, predatory or anti-competitive practices in air transportation, . . .

49 U.S.C. § 1302.

The foregoing statute was modeled after a similar provision in the Federal Trade Commission Act which also prohibits "unfair methods of competition in commerce and unfair or deceptive acts or practices." *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 82 (1955). The Federal Aviation Act

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[3] Under the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, § 3(e) (Oct. 4, 1984), on January 1, 1985, the Department of Transportation will assume all consumer protection powers and duties of the CAB, including the prevention of unfair or deceptive practices by interstate air carriers.

also creates an extensive administrative enforcement scheme and empowers the CAB to implement regulations to carry out the purposes of the Act. 49 U.S.C. § 1324.

Additionally, 49 U.S.C. § 1381 gives the CAB the specific power to investigate deceptive practices:

> The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in any unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

The CAB is also statutorily authorized to investigate complaints (49 U.S.C. § 1482), to file suit for violations of the Federal Aviation Act and to seek appropriate injunctive relief. 49 U.S.C. § 1487.

In conformance with its powers under the Federal Aviation Act, the CAB has specifically adopted regulations relating to advertising of an air carrier's services which constitute a "deceptive practice" or an "unfair method of competition." Thus, regulations

have been enacted prohibiting misrepresentations[4] or misleading advertising by ticket agents (C.F.R. § 399.80 (1984)) and misleading advertising concerning an air carrier's schedule performance. 14 C.F.R. § 399.81 (1984). In addition, the CAB has specifically determined what is a deceptive rate advertising practice with respect to group tours. 14 C.F.R. § 399.84 (1984). By regulation, the CAB has also mandated that air carriers provide a clear and explicit statement, arranged in a simple and systematic manner, of their rates:

> All fares, rates, and charges shall be clearly and explicitly stated and shall be arranged in a simple and systematic manner. Complicated plans and ambiguous or indefinite terms shall not be used. So far as practicable, the fares, rates, and charges shall be subdivided into items or similar units, and an identifying number shall be assigned to each item or unit to facilitate reference thereto. 14 C.F.R. § 221.50 (1984).

In conformance with its authority, the CAB has also issued extensive regulations as to the manner in which fares can be set and stated. 14 C.F.R. §§ 221.54, *et seq.* (1984).

Pursuant to 49 U.S.C. § 1381 and the regulations it has promulgated, the CAB has in fact actively enforced its regulations on unfair and misleading advertising. *See, e.g., International Tours v. Qantas Airways*, 78-10-129, C.A.B. Adv. Dig. p. 61 (Dec. 29, 1978) (tour brochures with erroneous information); *Pan American Enforcement Proceeding*, 79-9-95, C.A.B. Adv. Dig. p. 53 (Sept. 1979) (unfair practices in advertisements of round-trip flights, flight bookings, availability of tickets, information regarding

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[4] 14 C.F.R. § 399.80 (1984) provides:

> The word "misrepresentation" used in this list includes any statement or representation made in advertising or made orally to members of the public which is false, fraudulent, deceptive or misleading, or which has the tendency or capacity to deceive or mislead.

discount rates and failure to disclose total cost of tickets); *Delta Enforcement*, 78-9-140 C.A.B. Adv. Dig. p. 76 (Sept. 1979) (newspaper advertisement of nonstop service for a flight which was a connecting service); *World Airways v. American, et al.*, compalint 79-10-7 C.A.B. Adv. Dig. p. 5 (Oct. 1979) (advertisement of unrestricted fares).

It is apparent from the foregoing statutory and regulatory scheme that the CAB has exercised jurisdiction over deceptive advertising practices. The CAB has authority over rate advertising and indeed over all advertising of rates, routes and services - to the exclusion of state regulation. Not only has Congress preempted state regulations relating to an air carrier's rates, routes and services, but also, the CAB has itself expressly preempted state regulation by virtue of its own regulatory scheme and enforcement activities. *People v. Civil Aeronautics Board*, 581 F.2d 954, 960 (D.C. Cir. 1978) ("The Civil Aeronautics Board is empowered by Congress to preempt state regulatory agencies in interstate commerce. . . .")

The State of California's complaint constitutes a regulation "relating to" Western's "rates, routes and services." By taking issue with the rate and service descriptions utilized by Western, the State of California is trying to supplant the CAB's jurisdiction over an air carrier's alleged deceptive advertising practices. Western, like many other interstate carriers, operates in a substantial number of states. If each state regulated an interstate air carrier's promotion and advertising of its tariff schedules, rates, routes and services by imposing detailed and varied requirements, a readable flight schedule could not even be produced, much less a promotional campaign. Advertisements would be subject to conflicting regulation in several states, with each state demanding different rate descriptions, disclosures or terms of the promotion. The onerous nature of such multiplicitous and conflicting regulations demands a uniform system of regulation mandating federal preemption.

The comprehensiveness and pervasiveness of the enforcement scheme provided by the Federal Aviation Act and Airline Deregulation Act of 1978 and their implementing regulations for violations of these Acts are self-evident. The detail and precision with which Congress provided the means for the enforcement of those Acts, as well as the manner in which the CAB has regulated and enforced the area, logically leads to the conclusion that Congress and the CAB left no room for state law actions to supplement the remedies Congress detailed.

Varying state law interpretations of the obligation of interstate air carriers to avoid "deceptive advertising practices" would frustrate the uniformity of decision necessary to develop a consistent approach to federal regulation of air commerce. It would be inconsistent with federal policy if local authorities retained the power to make decisions respecting the rights and duties of interstate air carriers that have been committed to the jurisdiction of a federal administrative agency which has a nationwide overview of the air carrier industry.

C. STATE REGULATION OF AN INTERSTATE AIR CARRIER'S ADVERTISING OF ITS RATES, ROUTES AND SERVICES IMPOSES AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE.

A state regulation which impedes the free flow of, and is burdensome to, interstate commerce violates the Commerce Clause established by Article I, Section 8, of the Constitution of the United States. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). The underlying purpose of the Commerce Clause is to establish, promote and develop a national economic structure, which allows free access to the national marketplace. *Hood & Sons v. Dumond*, 336 U.S. 525, 537-39 (1949). Attempted intrusions upon the Commerce Clause have been diverse, and recent Supreme Court decisions have emphasized the importance of

maintaining the structure of a national economic unit. *See e.g., Hicklin v. Orbeck*, 437 U.S. 518 (1978); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977).

The People's complaint is based upon the simple premise that Western, in advertising a bonus program to purchasers of "full-fare coach" tickets, is allegedly involved in a deceptive or misleading advertising program. By way of its action, the State of California is clearly attempting to regulate the manner in which Western promotes and advertises its rates, routes and services. Attempted regulation by up to fifty state regulatory agencies clearly imposes the impermissible burden upon interstate commerce and presents a distinct danger of conflicting determinations by the CAB or Department of Transportation on one hand and by one or more state enforcement agencies on the other. *See Pennsylvania v. Nelson*, 350 U.S. 497, 505 (1956); *Howard v. Uniroyal, Inc.*, 719 F.2d 1552, 1561-62 (11th Cir. 1983).

D. STATE REGULATION OF INTERSTATE AIR CARRIERS' ADVERTISING OF THEIR RATES, ROUTES AND SERVICES CONFLICTS WITH THE PRIMARY JURISDICTION OF THE CAB AND DEPARTMENT OF TRANSPORTATION.

When a judicial action has been brought in the public interest and involves the resolution of a claim which, under a regulatory scheme has been placed within the special competence of an administrative agency, that claim falls within the "primary jurisdiction" of the agency. Accordingly, a court should defer to the administrative agency and allow it to resolve the issue. *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 63-64 (1956). Where the regulation of an industry has been entitled to a particular administrative agency, that agency is "better equipped than courts by specialization, by insight gained through experience, and

by more flexible procedure" to resolve the issues relating to that industry. *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952).

An extensive regulatory scheme has been established by federal statutes and rules to prevent unfair or deceptive practices by interstate air carriers. By virtue of that regulatory scheme, the federal agency responsible for overseeing and enforcing the same has "primary jurisdiction" of matters encompassed within claims of alleged misleading advertising or unfair competition by an interstate air carrier, including claims of misleading advertising.

Under Section 411 (49 U.S.C. § 1381), the terms "unfair or deceptive practices" and "unfair methods of competition" are broader than common-law concepts of unfair competition. Actions to prevent such activities are brought in the public interest. *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 306 (1962); *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 84 (1955). The action filed in this case by the California Attorney General's Office is similarly brought in the public interest. *People v. Pacific Land Research Company*, 20 Cal.3d 10, 17, 569 P.2d 125, 141 Cal.Rptr. 20, 24 (1977); *Payne v. United California Bank*, 23 Cal.App.3d 850, 856, 100 Cal.Rptr. 672, 676 (1972).

It has been recognized that the regulation of the air carrier industry has been committed "to an administrative agency of special competence that deals only with the problems of the industry." *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 84 (1955). In view of the express congressional intent that the Department of Transportation carry on the enforcement duties and rules of the CAB,[5] that expertise should continue.

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[5] 130 *Cong. Rec.* S 10066 (daily ed. Aug. 8, 1984) (remarks of Senator Stevens); 130 *Cong. Rec.* H 5237 (daily ed. June 5, 1984) (remarks of Congressman Mineta).

The action in the case at hand is an attempt to regulate an area falling within the primary jurisdiction of a federal agency. The Supreme Court has twice previously held that civil actions brought in the public interest, and which attempted to regulate alleged unfair or deceptive practices of interstate air carriers, were subject to the primary jurisdiction of the CAB. *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1962). In *Pan American World Airways*, civil antitrust claims were held barred by the CAB's jurisdiction under Section 411 to investigate and determine whether an air carrier was engaged in unfair or deceptive practices or unfair methods of competition in air transportation. Similarly, in *Nader*, the Supreme Court again held that actions brought in the public interest to regulate alleged deceptive practices of interstate air carriers were subject to the primary jurisdiction of the CAB. Thus, the Court determined that specific issues are to be referred to the agency for initial determination in order to secure "[u]niformity and consistency in the regulation of business entrusted to a particular agency." 426 U.S. at 304.

The Attorney General of the State of California could have brought his claim through the administrative enforcement scheme specifically provided by Congress to regulate the allegedly deceptive or unfair practices of interstate air carriers, rather than through a state law action. It is the nationwide responsibility of a federal agency, and not the responsibility of each of the various states, to monitor such activities. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). *See also Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 197 (1978) ("The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application, but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board."). In any event, the CAB should have been given the opportunity to investigate the claims of the State of California and to assume jurisdiction under its regulatory

scheme. *United States v. Superior Court*, 19 Cal.2d 189, 195, 120 P.2d 26, 29 (1941) ("[I]t lies within the power of the administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction.") However, the CAB was never given that opportunity.

The power to regulate the deceptive practices or unfair competition of interstate air carriers has been granted to a federal agency, the CAB until January 1, 1985, and the Department of Transportation thereafter, and falls exclusively within its jurisdiction.

A federal agency has been given the primary jurisdiction to bring actions in the public interest to prevent unfair or deceptive trade practices, and has exercised that jurisdiction through regulations and its enforcement powers. The complaint brought by the People of the State of California conflicts with the primary jurisdiction of that federal agency. In light of the need for uniformity, questions raised by the state complaint should have first been referred to the federal agency for determination.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeal of the State of California, Fourth Appellate District.

DATED: October 24, 1984

Respectfully submitted,

MILLER, BOYKO AND BELL

By: EDGAR PAUL BOYKO
ROBERT K. SCHRANER

Attorneys for Petitioner

APPENDICES

BEST AVAILABLE COPY

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,	
Plaintiff and Appellant,	
v.	D 000850
WESTERN AIRLINES, INC.,	4 Civ. No. 28920
Defendant and Respondent.	(Super. Ct. No. 494202)

APPEAL from a judgment of the Superior Court of San Diego County, William L. Todd, Jr., Judge. Reversed.

John K. Van De Kamp, Attorney General, Herschel T. Elkins, Senior Assistant Attorney General, Albert Norman Shelden and M. Howard Wayne, Deputy Attorneys General, for Plaintiff and Appellant.

Miller, Boyko and Bell, Edgar Paul Boyko and Fletcher W. Paddison, for Defendant and Respondent.

The People sued Western Airlines, Inc., for civil penalties and injunction, alleging Western violated Business and Professions Code section 17500 and Civil Code section 1770, subdivision (m), and engaged in unfair competition under Business and Professions

Code section 17200 et. seq., by making false and misleading statements implying fare savings in advertising promotions. Western demurred, asserting the complaint was preempted by 49 United States Code section 1305 and violated the commerce clause of the United States Constitution (art. I, § 8). Western also asserted under 49 United States Code section 1381 the Civil Aeronautics Board (Board) had primary jurisdiction over complaints about deceptive advertising and the court lacked subject matter jurisdiction. After hearing, the superior court found the matters raised in the complaint were preempted by federal law. The court sustained Western's demurrer without leave to amend. The People appeal.

Under 49 United States Code section 1381, enacted as part of the Federal Aviation Act of 1958, the Board in the public interest may investigate and determine whether any air carrier "has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof"; the Board has power to order air carriers to cease such improper conduct.

Under 49 United States Code section 1506, also enacted as part of the Federal Aviation Act of 1958, nothing in chapter 20 of title 49, United States Code (the Federal Aviation Program) "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Under 49 United States Code section 1302(a)(7), as amended by the Airline Deregulation Act of 1978, the Board in exercising its powers and duties shall consider "as being in the public interest . . . prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation . . ."

Under 49 United States Code section 1305(a), added by the Airline Deregulation Act of 1978, no state or its political subdivision "shall enact or enforce any law . . . relating to rates, routes, or services" of an authorized interstate air carrier.

Asserting this lawsuit does not involve matters preempted by federal law, the People contend the court erred in sustaining Western's demurrer. The Federal Aviation Program expressly preempts state regulation of interstate air carriers only as to laws "relating to rates, routes, or services." (49 U.S.C. § 1305(a).) Here the People do not seek to enforce a law relating to rates, routes or services; the People do not challenge Western's rates, routes or services. The People's complaint involves the distinct issue of the manner Western advertised its rates and services. (See *Brunwasser v. Trans World Airlines, Inc.* (1982) 541 F. Supp. 1338, 1346.) 49 United States Code section 1305(a) does not insulate Western from liability for violating California statutes prohibiting false advertising.

Under 49 United States Code sections 1302 and 1381, Congress granted the Board authority to regulate in the public interest unfair competition and deceptive practices by interstate air carriers. However, nothing in the Federal Aviation Program suggests by granting the Board such authority Congress intended to prevent states from also regulating deceptive advertising practices by interstate air carriers. (See *Head v. New Mexico Board of Examiners in Optometry* (1963) 374 U.S. 424, 430-432; see also *Nader v. Allegheny Airlines, Inc.* (1976) 426 U.S. 290, 300-303.) Further, nothing in this record suggests enforcing California's false advertising statutes against interstate air carriers in any manner conflicts with the Federal Aviation Program or impedes Congress' objectives in enacting such Program. (See *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 93-94.) Moreover, the Federal Aviation Program generally preserves existing common law and statutory remedies while providing additional remedies (49 U.S.C. § 1506). Given section 1506, state regulation of interstate air carriers is preempted only where the federal and state regulatory schemes conflict irreconcilably (*Nader v. Allegheny Airlines, Inc., supra*, 426 U.S. 290, 299). Nothing in this record suggests any inconsistency between California's false advertising statutes and the Federal Aviation Program precluding as a matter of law their coexistence

here; any assertion of more than incidental impact on rates resulting from California imposing liability on Western for false advertising or from Western adopting practices to avoid such liability involves factual issues beyond the scope of demurrer. On this record the People's complaint is not preempted by federal law.

Western contends state regulation of advertising by interstate air carriers unconstitutionally burdens interstate commerce. However, Western points to nothing in this record supporting such contention as a matter of law. Nothing in this record suggests California's false advertising statutes as a matter of law discriminate against air carriers engaged in interstate commerce or impinge upon an area of interstate commerce requiring uniform regulation. (See *Head v. New Mexico Board of Examiners of Optometry, supra*, 374 U.S. 424, 429.) Any contention such statutes as applied to regulate Western's advertising unconstitutionally burden interstate commerce involves factual issues beyond the scope of demurrer.

The superior court should have overruled Western's demurrer.

The judgment is reversed.

CERTIFIED FOR PUBLICATION.

Brown,
BROWN, P.J.

WE CONCUR:

STANIFORTH, J.

WORK, J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 26 1984

I have this day filed Order ~~HEARING DENIED~~

In re: 4 Civ. *No.* 28920

PEOPLE

vs.

WESTERN AIRLINES, INC.

Respectfully,

Clerk

877 8-82 4M • OSP

STATUTES

29 U.S.C. § 1144(a) provides:

> (a) *Supersedure; effective date.* Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

49 U.S.C. § 1302(a)(3), (4) and (7) provides:

> (a) *General factors for consideration.* In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> * * *
>
> (3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers and foreign air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, the need to improve relations among, and coordinate transportation by, air carriers, and the need to encourage fair wages and equitable working conditions for air carriers.
>
> (4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital, taking account, nevertheless of material

differences, if any, which may exist between interstate and overseas air transportation, on the one hand, and foreign air transportation, on the other.

* * *

(7) The prevention of unfair, deceptive, predatory or anticompetitive practices in air transportation, . . .

49 U.S.C. § 1305(a)(1) provides:

(a) *Preemption*. (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this Act [49 USCS §§ 1371 et seq.] to provide interstate air transportation.

49 U.S.C. § 1324(a) provides:

(a) *Performance of acts; conduct of investigations; orders, rules, regulations, and procedure*. The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this Act.

49 U.S.C. § 1381 provides:

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in any unfair or deceptive practices or unfair methods of

competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

49 U.S.C. § 1482 provides:

(a) *Filing of complaints; complaints against members of the Armed Forces.* Any person may file with the Administrator [Secretary of Transportation] or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator [Secretary of Transportation] or the Board to investigate the matters complained of. * * *

(b) *Investigations on initiative of Administrator [Secretary of Transportation] or Board.* The Administrator [Secretary of Transportation] or Board, with respect to matters within their respective jurisdictions, is empowered at any time to institute an investigation, on their own initiative, in any case and as to any matter or thing within their respective jurisdictions, concerning which complaint is authorized to be made to or before the Administrator [Secretary of Transportation] or Board by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Administrator [Secretary of Transportation] or the Board shall have the same power to proceed with any investigation instituted on their own motion as though it had been appealed to by complaint.

(c) *Entry of orders for compliance with 49 USCS §§ 1301 et seq.* If the Administrator [Secretary of Transportation] or the Board finds, after notice and hearing, in investigation instituted upon complaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Administrator [Secretary of Transportation] or the Board shall subject to section 1102(a) of this Act [49 USCS § 1502(a)] issue an appropriate order to compel such person to comply therewith.

(d) *Power to prescribe rates and practices of air carriers.* (1) Except as provided in paragraph (2) or (4) of this subsection, whenever after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate air transportation of persons, air transportation of property within the State of Alaska, air transportation of property within the State of Hawaii, or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective.

* * *

(3) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate or charge demanded, charged, collected, or received by any air carrier for interstate air transportation of property or any classification, rule, regulation, or practice affecting such rate or charge, or the value of the service thereunder, is or will be unjustly discriminatory,

or unduly preferential, or unduly prejudicial, or predatory the Board shall alter such rate, charge, classification, rule, regulation, or practice to the extent necessary to correct such discrimination, preference, prejudice, or predatory practice and make an order that the air carrier or foreign air carrier shall discontinue demanding, charging, collecting, or receiving any such discriminatory, preferential, prejudicial, or predatory rate or charge or enforcing any such discriminatory, preferential, prejudicial, or predatory classification, rule, regulation, or practice.

* * *

49 U.S.C. § 1487 provides:

(a) If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Board or Administrator [Secretary of Transportation], as the case may be, their duly authorized agents, or, in the case of a violation of section 1114 of this Act [49 USCS § 1514], the Attorney General, or, in the case of a violation of section 401(a) of this Act [49 USCS § 1371(a)], any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and requiring their obedience thereto.

(b) Upon the request of the Board or Administrator, any district attorney of the United States to whom the Board or Administrator may apply is authorized to institute in the

proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the provisions of this Act or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, § 3(e) (Oct. 4, 1984), provides:

(e) Section 1601(b)(1) is amended by adding at the end thereof the following:

"(E) All authority of the Board under this Act which is not terminated under subsection (a) of this section on or before January 1, 1985, and is not otherwise transferred to the Department of Transportation."

REGULATIONS

14 C.F.R. § 221.50 (1984) provides:

All fares, rates, and charges shall be clearly and explicitly stated and shall be arranged in a simple and systematic manner. Complicated plans and ambiguous or indefinite terms shall not be used. So far as practicable, the fares, rates, and charges shall be subdivided into items or similar units, and an identifying number shall be assigned to each item or unit to facilitate reference thereto.

14 C.F.R. § 399.80 (1984) provides:

The word "misrepresentation" used in this list includes any statement or representation made in advertising or made orally to members of the public which is false, fraudulent,

deceptive or misleading, or which has the tendency or capacity to deceive or mislead.

14 C.F.R. § 399.81 (1984) provides:

Deceptive practices in advertising of schedule performance.

With respect to the advertising of schedule performance, it is the policy of the Board to regard as an unfair or deceptive practice or an unfair method of competition the use of any figures purporting to reflect schedule or ontime performance without indicating the basis of the calculation, the time period involved, and the pairs of points or the percentage of system-wide operations thereby represented and whether the figures include all scheduled flights or only scheduled flights actually performed.

14 C.F.R. § 399.84 (1984) provides:

(a) It is the policy of the Board to consider the practice of an air carrier, foreign air carrier or ticket agent of advertising a group inclusive tour involving a scheduled flight in air transportation, to be an unfair or deceptive practice and an unfair method of competition in air transportation or the sale thereof, within the meaning of section 411 of the Act, unless such advertisement clearly discloses the total tour price.

(b) For the purposes of paragraph (a), above, "total tour price" means the total amount of money to be paid by the tour participant for the group inclusive tour, exclusive of options.

MOTION FILED
NOV 21 1984

84-668 (2)

No. 84-688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WESTERN AIRLINES, INC.,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

MOTION OF AIR TRANSPORT ASSOCIATION OF AMERICA FOR LEAVE TO FILE AS *AMICUS CURIAE* A BRIEF IN SUPPORT OF THE PETITION OF WESTERN AIRLINES, INC. FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA AND BRIEF OF AIR TRANSPORT ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF WESTERN AIRLINES, INC.

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November 21, 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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No. 84-688

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1984

WESTERN AIRLINES, INC.,
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November 21, 1984

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WESTERN AIRLINES, INC., FOR
A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA

The Air Transport Association of America (ATA) respectfully requests leave to file a brief as amicus curiae in support of the petition of Western Airlines, Inc., (Western) for a writ of certiorari to the Court of Appeal, Fourth District, of the State

of California. We seek this leave because the respondent has not consented to the filing of our brief.

ATA is a non-profit, unincorporated trade association that is located in Washington, D.C. It is comprised of 35 federally licensed airlines.[1/] Our

---

[1/] The following airlines are members of ATA: Air California; Air Canada; Air Florida, Inc.; Air One, Inc.; Alaska Airlines, Inc.; Aloha Airlines, Inc.; American Airlines, Inc.; Best Airlines, Inc.; Braniff, Inc.; Capitol International Airways, Inc.; Continental Airlines, Inc.; CP Air; Delta Air Lines, Inc.; Eastern Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corp.; The Flying Tiger Line, Inc.; Frontier Airlines, Inc.; Hawaiian Airlines, Inc.; Jet America Airlines, Inc.; Midway Airlines, Inc.; Muse Air, Inc.; Northwest Airlines, Inc.; Ozark Air Lines, Inc.; Pan American World Airways, Inc.; Piedmont Airlines; PSA - Pacific Southwest Airlines, Inc.; Purolator Courier, Inc; Republic Airlines, Inc.; Trans World Airlines, Inc.; United Airlines, Inc.; United Parcel Service; USAir, Inc.; Western Airlines, Inc.; and Wien Airlines, Inc.

members provide extensive interstate and foreign scheduled passenger services. Many of those services are to and from the State of California (the State).

The decision of the court below permitting the State to proceed with its civil action in which it has alleged that Western has engaged in deceptive advertising and unfair competitive practices has significant implications for our members. This case raises two especially important issues affecting airlines that operate in interstate and foreign commerce. They are the preemptive effect of the Airline Deregulation Act of 1978 upon the regulatory activities of states and the undue burden upon interstate commerce that such activities impose

upon airline operations.

We do not believe that the court below adequately examined these issues. Its failure to do so directly contradicts the reformative purpose that prompted Congress to enact the Airline Deregulation Act of 1978 and the preemption provision that it included in that legislation. See People v. Western Airlines, Inc., 155 Cal. App. 3d 597, 202 Cal. Rptr. 237, 238-39 (1984). Its decision permits the State to proceed in an action that involves its economic regulation of a federally licensed airline's activities. Congress did not intend in 1978 when it began the removal of intense federal economic regulation of the airlines that the states be permitted to substitute

themselves for federal regulators. Indeed, it was so concerned about that possibility that it enacted a preemption provision in the Airline Deregulation Act of 1978. Pub. L. No. 95-504, §4(a), 92 Stat. 1705, 1707-08 (1978) (codified at 49 U S.C. §1305(a) (Supp. V 1981)).

We believe that because of ATA's presentations to Congress in 1978 and subsequently concerning airline regulatory reform and the myriad interstate activities that our members conduct, that we can assist the Court in examining the legislative intent of the Airline Deregulation Act of 1978, and especially its preemption provision, and the implications upon our industry's operations of the decision of the court below. We therefore respectfully request leave to file our brief as

amicus curiae in support of

Western's petition for certiorari.

Respectfully submitted,

/s/ James E. Landry
James E. Landry

/s/ David R. Murchison
David R. Murchison

/s/ James L. Casey
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November 21, 1984

No. 84-688

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Respondent.

BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION OF WESTERN AIRLINES, INC. FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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November 21, 1984

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BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION OF WESTERN AIRLINES, INC. FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

The Air Transport Association of America (ATA) as amicus curiae supports the petition for a writ of certiorari to the Court of Appeal, Fourth District, of the State of California in this proceeding which Western Airlines, Inc. (Western) filed on October 24, 1984.

I. INTERESTS OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICUS CURIAE

ATA is a non-profit, unincorporated association. It is comprised of 35 federally licensed airlines.[1/]

[1/] The following airlines are members of ATA: Air California; Air Canada; Air Florida, Inc.; Air One, Inc.; Alaska Airlines, Inc.; Aloha Airlines, Inc.; American Airlines, Inc.; Best Airlines, Inc.; Braniff, Inc.; Capitol International Airways, Inc.; Continental Airlines, Inc.; CP Air; Delta Air Lines, Inc.; Eastern Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corp.; The Flying Tiger Line, Inc.; Frontier Airlines, Inc.; Hawaiian Airlines, Inc.; Jet America Airlines, Inc.; Midway Airlines, Inc.; Muse Air, Inc.; Northwest Airlines, Inc.; Ozark Air Lines, Inc.; Pan American World Airways, Inc.; Piedmont Airlines; PSA - Pacific Southwest Airlines, Inc.; Purolator Courier, Inc.; Republic Airlines, Inc.; Trans World Airlines, Inc.; United Airlines, Inc.; United Parcel Service; USAir, Inc.; Western Airlines, Inc.; and Wien Airlines, Inc.

All but two of the members of ATA operate in interstate commerce. The two exceptions, Air Canada and CP Air, operate in foreign commerce.

ATA's Articles of Association govern its activities. Among the objectives and purposes stated in the Articles are the following:

> To promote and develop the business of transporting goods and mail by aircraft between fixed termini on regular schedules, and through special service, to the end that the best interests of the public and the members of the Association be served.
>
> To advocate the enactment of just and proper laws governing the airline business.
>
> To improve the transportation service rendered by its members.

> To cooperate with all public officials in securing the proper enforcement of all laws affecting air transportation.
>
> In furtherance of these objects and purposes, to partipate... in... proceedings before governmental agencies and courts.

II. SUMMARY OF ARGUMENT

This case concerns a civil penalty and injunction action that the State of California (the State) has brought against Western. People v. Western Airlines, Inc., 155 Cal. App. 3d 597, 202 Cal. Rptr. 237 (1984). The State has alleged that certain advertising activities of Western were deceptive and constituted unfair competition within the meaning of applicable provisions of California law. Id. The California Court of Appeal, Fourth District, re-

versed a Superior Court, San Diego County, determination that the State's complaint was preempted by federal law and that it violated the Commerce Clause of the U.S. Constitution. Id. The Supreme Court of California refused to hear Western's appeal of the Court of Appeal's decision.

We believe that the Court of Appeal erroneously decided two important questions of federal law.

Federally certificated airlines have benefitted from the Congressionally mandated regulatory reforms of the airline industry that have occurred during the last six years. The refusal of the court below to apply the preemption provision that Congress included in the Airline Deregulation Act of 1978 jeopardizes

their continued enjoyment of some of those reforms. Furthermore, they daily operate a multitude of interstate flights. The refusal of the court below to find that the State's action would result in an undue burden on interstate commerce endangers a uniform national air transportation system.

III. THE STATE OF CALIFORNIA IS PREEMPTED FROM ENGAGING IN ACTIONS THAT ARE RELATED TO THE RATES OF AN INTERSTATE AIR CARRIER

The State, in bringing this action against Western Airlines, has sought to regulate rate-related matters that Congress preempted in the Airline Deregulation Act of 1978. Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified at 49 U.S.C. §1301 et seq. (Supp. V 1981)).

The Airline Deregulation Act was the product of an exhaustive Congressional examination of and debate about the future of what theretofore had been an intensely, federally regulated industry. Congress concluded that the domestic airline industry should in large measure be deregulated. Concomitantly, Congress mandated that the several states were precluded from filling the gap that would be left by this federal withdrawal from the field of economic regulation.

The pressing need for regulatory reform was the predominant theme of the deliberations concerning the two airline deregulation bills that Congress considered in 1978. See H.R. Rep. No. 1211, 95th Cong., 2d Sess. 1-4 (1978)

(H.R. 12611); S. Rep. No. 631, 95th Cong., 2d Sess. 1-5 (1978) (S. 2493). Members of both Houses of Congress repeatedly expressed that view when they debated the Airline Deregulation Act conference report. See 124 Cong. Rec. 37,416-21 (Senate); id. 38,521-27 (House of Representatives). See generally H.R. Rep. No. 1779, 95th Cong., 2d Sess. 56 (1978) (conference report). Senator Kennedy, who had introduced an earlier airline regulatory reform bill, said that:

> The mandate to the conferees was clear: There is an immediate need to loosen the reins of the CAB over civil aviation and to get the Government out of the expensive business of running the domestic airline industry.

124 Cong. Rec. 37,418. Similarly, Representative Snyder, who at that

time was the ranking minority Member on the House Aviation Subcommittee, stated that:

> This legislation establishes a new Federal policy in the area of airline economic regulation.... In place of excessive, stifling Government involvement in the day-to-day operation of the airlines, the legislation will relax regulatory requirements and permit airline managements to exercise greater discretion in providing service and establishing fares.

Id. 38,522.

The Airline Deregulation Act thus unfettered the domestic operations of U.S. airlines. In the area of passenger fares, Congress determined that Civil Aeronautics Board regulation should cease on January 1, 1983. Pub. L. No. 95-504, §40(a), 92 Stat. 1705, 1745 (1978) (codified at

49 U.S.C. §1551(a)(2) (Supp. V. 1981)). Congress, however, did not intend that the yoke of needless federal economic regulation that it had cast off the airline industry should be replaced by the multiple yokes of state regulation.

To protect federally licensed airlines against state economic regulation of their activities, Congress in 1978 enacted in the Airline Deregulation Act a preemption provision that has been codified as section 105(a) of the Federal Aviation Act (the Act). Pub. L. No. 95-504, §4(a), 92 Stat. 1705, 1707-08 (1978) (codified at 49 U.S.C. §1305(a) (Supp. V 1981)). That provision was designed to prevent the states from frustrating the

regulatory reforms that the Airline Deregulation Act created. The House Committee on Public Works and Transportation in a report about H.R. 12611, which contained the preemption provision that was enacted in the Airline Deregulation Act, stated that the provision would "prevent conflicts and inconsistent regulations." H.R. Rep. No. 1211, 95th Cong., 2d Sess. 16 (1978).

The language that Congress chose to include in Section 105(a) of the Act to describe the scope of preemption is quite expansive. It prohibits state activity "relating to [the] rates, routes, or services" of federally

licensed airlines.[2/] 49 U.S.C. §1305(a) (Supp. V 1981). That term has not been definitively construed. However, this Court recently interpreted in another statutory context the term "relate to." It appears in the preemption provision of the Employee Retirement Income Security Act of 1974. 29 U.S.C. §1144(a) (1982). The Court in Shaw v. Delta Air Lines, Inc., ___U.S.___, 103 S.Ct. 2890,

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[2/] In regard to interstate air transportation, the term "federally licensed" means either a Civil Aeronautics Board-issued certificate of public convenience and necessity or an exemption. 49 U.S.C. §1305(a) (Supp. V 1981). See Hughes Air Corp. v. Public Utils. Comm'n., 644 F.2d 1334, 1337-39 (9th Cir. 1981). Western Airlines possesses a Board-issued certificate of public convenience and necessity.

2900 (1983), concluded that a "law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."

The expansiveness of section 105 is revealed in two additional ways. First, subsection (a)(1) of it, which is the preemption provision, applies to both the interstate and intrastate operations of federally licensed airlines. 49 U.S.C. §1305(a)(1) (Supp. V 1981). Second, Congress recognized in section 105 only two very discrete areas of permitted state activity. None of them is applicable to this action. See 49 U.S.C. §1305(a)(2) (intra-Alaska operations), (b) (state and local proprietary rights) (Supp. V 1981).

The Court of Appeal in the instant case did not acknowledge the implication of Congress' preemption of the regulation of federally licensed airlines. It consequently failed to apply section 105(a) of the Act in the way that both fulfilled its meaning and protected the regulatory reforms enacted in the Airline Deregulation Act.

The State's initiation of this action was an attack upon one of the essential objectives of deregulation: the freedom of airlines to establish and market their domestic passenger fares without governmental interference. Congress assumed that the elimination of rate regulation would result in the airlines offering the travelling public different types of service at different prices. See 124 Cong. Rec. 37,418-19

(remarks of Sen. Kennedy). This fundamental statutory change means that the consumer is provided with the opportunity, and ultimately the responsibility, to decide which airline fare is most attractive to him or her. The State in this action has attempted to abort this decision-making process; it seeks to assume the unauthorized role of judging which terms and levels of fares are appropriate. Its effort directly contradicts the objectives of Congress.

Congress enacted section 105(a) of the Act in 1978 because it had concluded that:

> [A] Federal grant of authority... to engage in interstate transportation... should give the Federal Government the sole responsibility for regulating that air carrier.

S. Rep. No. 631, 95th Cong., 2d Sess. 98 (1978). The Civil Aeronautics Board has

used its authority under the Act to conduct a wide-ranging consumer-protection program. The Airline Deregulation Act did not diminish the Board's power to prohibit unfair or deceptive airline practices. That authority is principally found in section 411 of the Act. 49 U.S.C. §1381 (1976). It is comparable to section 5(a) of the Federal Trade Commission Act. Compare id. with 15 U.S.C. §45(a) (1982).

Federal consumer-protection authority will continue after the Board's demise on December 31, 1984. Congress this year considered the disposition of various provisions of the Act. In the Civil Aeronautics Board Sunset Act of 1984, it transferred responsibility concerning some provisions of the Act and terminated others. Pub. L. No. 98-443,

98 Stat. 1703 (Oct. 4, 1984). Congress transferred the authority over section 411 to the Department of Transportation. Id. §3(e), 98 Stat. at 1704. Furthermore, it did not disturb section 105(a), the Act's preemption provision. See id. §3, 98 Stat. at 1703-04.

The transfer of section 411 and the continuation of section 105(a) of the Act indicate that Congress has not departed from the conclusion it reached in 1978 that the federal government should have the sole responsibility for regulating, to the extent such regulation continues to exist, federally certificated airlines.

Thus, the State's action has contradicted the will of Congress in two ways. First, it has invaded an area -- the establishment of airline fares -- from

which Congress withdrew federal regulation and explicitly protected from state regulation in section 105(a) of the Act. That decision to leave rate determinations to marketplace forces prevents the State from acting in this area. See NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971); Garner v. Teamsters Union, 346 U.S. 485, 500 (1953) (state activity in a field that federal policy has declared free from regulation is prohibited). Second, Congress concluded in the Airline Deregulation Act of 1978 that the federal government should have the sole responsibility for regulating the activities of federally licensed airlines and has provided for the continuation of a federal consumer-protection program in the Civil Aeronautics Board Sunset Act of 1984. The State's action subverts the

will of Congress and therefore it cannot be maintained. See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981).

IV. THE STATE OF CALIFORNIA'S ACTION HAS IMPOSED AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE

The State's action impedes the free flow of interstate commerce and impermissibly burdens that commerce. It attempts to control the terms of the fare that an airline engaged in interstate commerce offers to the travelling public. Success in this endeavor will threaten the national economic structure that the Commerce Clause was intended to secure. U.S. Const. art. I, §8, cl. 3.

Airlines are peculiarly vulnerable to the type of state intervention that has occurred in this case. They have an

extensive network of interstate operations and they offer a myriad of fares for those flights. State intervention in fare-related matters seriously impedes their operations. They are members of the quintessential interstate industry. The destructive effect of such an intervention is magnified here because of the large number of interstate airline operations that occur in California. The potential harm to such operations that the State's action will cause thus could extend throughout the interstate air transportation system. Furthermore, successful state intervention in this case is likely to be replicated elsewhere, to the great detriment of the national transportation system.

Justice Jackson, thirty years ago in his concurring opinion in Northwest

Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944), captured the essence of the issues in this case. He, in a somewhat different context, said that:

> Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit would neutralize its indifference to space and conquest of time.... Congress has recognized the national responsibility for regulating air commerce. Federal control is... exclusive.

Id. at 303.

V. CONCLUSION

ATA respectfully requests that a writ of certiorari be issued to review the judgment of the Court of Appeal of

the State of California, Fourth District.

Respectfully submitted,

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(3)

No. 84-668

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WESTERN AIRLINES, INC.,
A DELAWARE CORPORATION,

PETITIONER,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

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QUESTION PRESENTED

Petitioner Misstates the Question.

Respondent respectfully suggests that petitioner in attempting to have this Court grant its Writ of Certiorari misstates the only question before this Court and in so doing, attempts to make a run-of-the-mill law enforcement false advertising case into a federal preemption case. The question involved in this case is whether an interstate airline which falsely advertises within California is free from state prosecution for violating California's false advertising statutes.

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No. 84-668

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WESTERN AIRLINES, INC.,
a Delaware Corporation,

PETITIONER,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

RESPONDENT.

On Petition For Certiorari
To The California Court of Appeal,
Fourth Appellate District,
Division One

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The People of the State of California, respondent herein, prays that petitioner's Writ of Certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District, Division

One, entered in the above-entitled case on May 8, 1984, be denied.

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division One (hereinafter "Opinion"), is reported at The People v. Western Airlines, Inc. (1984) 155 Cal.App.3d 597; 202 Cal.Rptr. 237, and is printed in Petitioner's Brief, Appendix, at page A-1. The judgment of the California Supreme Court denying a Petition for Hearing without opinion is printed in Petitioner's Brief at B-1.

STATEMENT OF THE CASE

On October 29, 1982, respondent filed its amended civil complaint which alleges, as the first cause of action, that petitioner Western Airlines, Inc., had made untrue or misleading statements concerning the cost to consumers to take advantage of

various discount promotional fares, which conduct is made unlawful and is prohibited by California Business and Professions Code section 17500. The complaint also alleges, as its second cause of action, that petitioner, by the use of such deceptive advertisements, had engaged in acts of unfair competition as defined in California Business and Professions Code sections 17200 through 17206, inclusive. (CT 1-7.) Petitioner's demurrer to the complaint and motion to dismiss (CT 8-42), was heard and the trial court sustained the demurrer, without leave to amend, upon its finding that the allegations raised by the complaint were preempted by federal law. (CT 70-71.)

Respondent filed timely notice of appeal from the judgment sustaining the demurrer and dismissing the complaint. (CT 72-73.)

On May 8, 1984, in a published opinion, the Court of Appeal, Fourth Appellate District, Division One, reversed the judgment of the Superior Court and ruled the trial court should have overruled petitioner's demurrer.

Petitioner's Petition for Hearing was denied by the California Supreme Court on July 26, 1984. Petition for writ of certiorari in this Court was mailed on October 24, 1984.

STATEMENT OF FACTS

Petitioner Western Airlines, Inc., conducts the business of scheduling and selling air flight services. In early 1982, petitioner advertised the availability of a $100 roundtrip fare to Hawaii if one first purchased and used a "full fare" coach[1/] or

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1. The "full fare" coach price ticket usually is not the least expensive ticket price available for purchase on any given route offered by petitioner.

first-class roundtrip ticket on any Western flight in excess of 400 miles one way.

Petitioner repeated this conduct with a second campaign later in 1982, when petitioner advertised the availability of a $100 roundtrip fare "to anywhere Western flies in the continental U.S. or Alaska," if one first purchased and used a "full fare" coach or first class roundtrip ticket on any Western flight in the United States, excluding Hawaii. (CT 3, 40, 45.)

A third campaign in 1982 advertised the availability of a $100 roundtrip fare to Hawaii on defendant's airline, if one first purchased and used a "full fare" coach or first class roundtrip ticket to anywhere Western "flies in the United States, except Alaska." (CT 3, 41, 45.)

Service and availability of petitioner's "full fare" coach and "economy class" fares were identical or substantially

identical in all respects except as to the cost charged customers. The "full fare" coach price was not commonly sold and petitioner used it at the time of the "$100 round trip" promotional fares to mislead the public as to the true cost of taking advantage of the promotional fare. (CT 2-5, 39, 45.)

Respondent's complaint, in substance, is aimed at petitioner's practice of using advertising campaigns which falsely imply to the public they will save money by taking advantage of petitioner's offer of a low roundtrip price to a far away place ($100 roundtrip to Hawaii or "anywhere Western flies in the Continental U.S. or Alaska;" (CT 3]) when combined with the prior purchase and use of a full fare coach or first class roundtrip ticket on a qualifying flight of petitioner.

/

ARGUMENT

THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PREVENTION OF DECEPTIVE ADVERTISING BY AIR CARRIERS IS NEITHER PREEMPTED BY FEDERAL LAW, NOR DOES IT CONSTITUTE A BURDEN ON INTERSTATE COMMERCE

Petitioner maintains this action, brought by the People of the State of California, is preempted by federal law. Petitoner argues such preemption is both implied and, by reason of the Airline Deregulation Act of 1978, expressed. (Petn., pp. 4-12.) Petitioner also argues this action would constitute an impermissible burden on interstate commerce and conflicts with the primary jurisdiction of the Civil Aeronautics Board. (Petn., pp. 12-18.)

A review on writ of certiorari is not a matter of right, but of judicial discretion, and should be granted only where there are special and important

reasons therefor. (Supreme Court Rule 17.1.) A right and fair result was reached by the decision below and respondent will demonstrate there is no basis for further review by this Court.

A. State Regulation of Deceptive Advertising by Interstate Air Carriers is Not Preempted by Federal Law.

Petitioner relies substantially on 49 U.S.C., section 1305, which provides in pertinent part:

> "(a) Preemption. (1) Except as provided in paragraph (2) of this subsection, no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority . . . to provide interstate transportation." (Emphasis added.)

This section deals with rates, routes and services. It says nothing about advertising. The instant action does not relate to rates, routes or services; it deals with misleading advertising. Consequently, the two cases which relate to misleading advertising by interestate air carriers decided since the adoption of 49 U.S.C. 1305, Brunwasser v. Trans World Airlines, Inc. (W.D. Pa., 1982) 541 F.Supp. 1338, and the instant case, have each rejected petitioner's position.

The rejection of petitioner's position is supported by the intent of Congress in passing the Airline Deregulation Act. Congress was concerned with loosening the economic regulation which had resulted in the Civil Aeronautics Board denying applications for new routes and discouraging experimentation with discount fares. (1978 U.S. Code Cong. and

Admin. News, pp. 3737-3738.) In loosening the economic fetters, it was crucial states not occupy the field from which the federal government had withdrawn and impose utility type regulation on interstate airline service and fares. (44 Fed. Reg. 9949.) To prevent this possibility, the preemption language of section 1305 on which petitioner relies was added to the Act. The legislative history of the Airline Deregulation Act states the purpose of section 1305:

> "This new section . . . prohibits a state from enacting any law, establishing any standard determining routes, schedules, or rates, fares, or charges in tariffs of, or otherwise promulgating economic regulations for, any air carrier certified by the Board." (1978 U.S. Code Cong. & Admin. News, p. 3804.)

In further stating the intent of the preemption language, the report of the House of Representatives Public Works and Transportation Committee (House Rept. No. 95-1211) declares that as to an interstate air carrier, the purpose of section 1305 was such that "no state may regulate that carrier's routes, rates or services." (1978 U.S. Code Cong. & Admin. News, p. 3752.)

There was no express preemption of regulation of deceptive advertising. Rather, the legislative history demonstrates Congress sought to prevent states from exercising an authority which it had withdrawn from the Civil Aeronautics Board. California is not attempting to regulate Western's "rates, routes or services." Rather, this action is based on the premise that Western can set any rates it desires,

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but that once it sets these rates, it must advertise them fairly and non-deceptively.

Nevertheless, petitioner attempts to find preemption by a rigid, mindless interpretation of the phrase "relates to." Petitioner is proverbially clutching at straws when it contends Shaw v. Delta Air Lines, Inc. (1983) _____U.S._____103 S.Ct. 2890, 77 L.Ed.2d 490, supports its position. For petitioner, the wish is the father of the thought.

Shaw involved interpretation of preemption language contained in the Employees Retirement Income Security Act of 1974 (ERISA, 29 U.S.C., § 1011, et seq). ERISA, as this Court noted, was intended to be a comprehensive statute regulating employee benefit plans. It contains a clause which preempts "any and all state laws . . . as they may . . . relate to any employee benefit plan" covered by ERISA.

At issue were two New York laws which sought to regulate benefit payments to employees.

The Shaw Court found the term "relates to" could be subject to either a "broad" or a "narrow" interpretation, and that in ERISA the former interpretation was applicable to its preemption language. This holding was not a general definition of "relates to", but rather was based on facts unique to the ERISA statute.

To wit:

1) A subsequent section of ERISA exempted generally applicable state criminal statutes from preemption, and such a section would have been unnecessary unless the preemption language was to be broadly construed;

2) A Congressional Conference Committee had rejected a more limited

preemption clause; and

3) Statements of sponsors of ERISA in subsequent debates which argued that ERISA constituted "the reservation to Federal authority of the sole power to regulate the field of employee benefit plans" and "with the narrow exception specified in the bill, the . . . provisions of the conference substitute are intended to preempt the field for Federal regulation. . . . This principle is intended to apply in its broadest sense . . . ." (Shaw v. Delta Air Lines, supra, 77 L.Ed.2d at 501-502.)

Thus, interpretations of the preemption language of ERISA say nothing about the meaning of the Airline Deregulation Act, where the Congressional intent was to prevent states from enacting the type of utility style legislation and regulations the Congress no longer wanted

the CAB to promulgate. The Act did not attempt to bar state regulation of deceptive advertising.

Similarly, petitioner's argument gains no substance from Alessi v. Raybestos Manhatten, Inc. (1981) 451 U.S. 504, which also involved ERISA. This Court held that ERISA was a "'comprehensive and reticulated statute'" in which Congress meant to establish that pension plan regulation was exclusively a federal concern. The state statute in question, which would have forbade the reduction of retirement benefits by the amount of a worker's compensation award, was found to relate to pension plans because it eliminated one method of calculating pension benefits (integration) which was permitted by federal law. Indeed, the Alessi Court pointed out that preemption was not to be found absent pervasive reasons, either in the nature of the

regulated subject matter, or in Congress' unmistakably ordained position favoring preemption. (Id, at 522.)

As previously demonstrated, petitioner's contention that Congress has unmistakably ordained preemption of the prosecution of misleading advertising by airlines is without support.

Petitioner's position that there has been an implied preemption of state regulation of deceptive advertising is similarly unavailing. Absent a firm foundation based upon explicit congressional declaration or readily apparent legislative history, neither of which appears in this case, talismanic invocation and acceptance of phrases such as "pervasiveness of federal regulation" would result in the setting aside of a great number of state statutes to satisfy the petitioner's, and many other litigants', imagined

Congressional purpose. (California v. Zook (1949) 336 U.S. 725, 732-733; Hines v. Davidowitz (1941) 312 U.S. 52, 78-79; see also Greater Westchester Homeowners Assn. v. City of Los Angeles (1979) 26 Cal.3d 86.)

Consequently, in the exercise of its police power, state sovereignty may be, in many areas of interstate commerce, parallel to and concurrent with that of the federal government. (Aldens, Inc. v. LaFollette (7th Cir. 1977) 552 F.2d 745, 750.) Even where comprehensive federal regulation exists, this Court has recognized states can regulate activities within their boundaries under their traditional police power. This concept of concurrent jurisdiction, which recognizes the legitimacy of both state and federal regulation of the same activity has been long recognized. (See e.g., Plumply v. Massachusetts

(1894) 155 U.S. 461 (upholding state laws relating to labeling); California v. Zook, supra, 336 U.S. 725 (upholding state highway safety laws which had a regulatory effect upon interstate commerce); Goldstein v. California (1973) 412 U.S. 546 (upholding state laws relating to literary protection); People v. Grosofsky (1946) 73 Cal.App.2d 15, (upholding state laws dealing with the sale of gasoline ration stamps), and People v. Patton (1983) 147 Cal.App.3d Supp. 1 (upholding state laws dealing with the sale, distribution and manufacture of electronic devices against a challenge the Federal Communications Act of 1934 [47 U.S.C. § 605] preempted the field).)

Petitioner's argument for implied preemption relies on the need for uniformity of regulation. However, cases cited

by petitioner such as County of Cook v. Priester (1974) 22 Ill.App.3d 964; 318 N.E.2d 327 (state effort to control the weight of aircrafts), and Village of Bensenville v. City of Chicago (1973) 16 Ill.App.3d 733; 306 N.E.2d 562 (control of noise and air pollution by prevention of the expansion of an airport) found preemption because of the effect of the state's action on the exclusive national sovereignty in the airspace of the United States. The cases say nothing about state action to prevent deceptive advertising.

Indeed, rather than implicitly preempting the type of action currently brought by California, Congress has specifically stated such action could continue to exist, side by side with federal authority. Section 1506 of Title 49 provides: "Nothing contained in this chapter [20] shall in any way abridge or

alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

In Nader v. Allegheny Airlines (1976) 426 U.S. 290, a plaintiff who had been "bumped" by the defendant airline, sued for fraudulent misrepresentation. The Court of Appeals stayed the claim pending referral to the Civil Aeronautics Board to determine whether defendant's practice of failing to disclose its overbooking policy was a deceptive practice under 49 U.S.C. section 1381, since a determination it was not would preclude a tort action for injury caused by that practice.

"The Court of Appeals found that 'although the saving clause of section 1106 [49 U.S.C. section 1506] purports to speak in absolute terms it cannot be read so literally.'

167 U.S. App. D.C., at 367, 512 F.2d, at 544." (Nader, supra, 426 U.S. at 298.)

This Court disagreed and stated: "The court in the present case . . . is not called upon to substitute its judgment for the agency's on the reasonableness of a rate--or indeed, on the reasonableness of any carrier practice. There is no Board requirement that air carriers engage in overbooking or that they fail to disclose that they do so. And any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental. Under the circumstances, the common-law action and the statute are not 'absolutely inconsistent' and may coexist, as

contemplated by § 1106. 49 U.S.C. § 1506." (Id., at 299-300.)

Likewise, in the matter currently before this Court, there is no attempt on the part of respondent to have the California courts substitute their judgment for that of the CAB on the reasonableness of a carrier's rates, routes or services. There is no CAB requirement that air carriers engage in untrue or misleading advertising or the performance of unlawful, unfair or deceptive practices. In short, there is no reason why the federal statutory scheme and California's statutory scheme cannot coexist, as contemplated by section 1506, as did plaintiff's common law tort claim in Nader.

Petitioner's reading of the Nader case at page 6 of its petition misses the mark. Petitioner seems to argue the saving clause provision of section 1506

means something different when applied to actions brought by the State pursuant to state statutes than when applied to an individual's common-law rights. From where petitioner conjures up this distinction respondent knows not.

Petitioner's effort to dismiss Nader as decided prior to the passage of the Airline Deregulation Act[2/] is rebutted by Brunwasser v. Trans World Airlines, Inc. (W.D. Pa., 1982) 541 F.Supp. 1338. This is the only reported case found by respondent dealing with the issues of advertising by an interstate air carrier, federal preemption and Section 1506 decided since adoption of the Airline Deregulation Act, and it upholds the vitality of state laws dealing with an air carrier's advertising, the Nader case and Section 1506.

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2. Petitioner states "Nader was decided in 1963." Not true; it was a 1976 decision. (Petn., p. 6.)

In Brunwasser, the defendant airline advertised a route for which the plaintiff bought a ticket, then discontinued the route before plaintiff's flight date. Plaintiff sued for violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law (count 2), and for fraudulent misrepresentation (count 4). The airline claimed the matters were preempted by federal law. The court disagreed:

> "At the outset, we find defendant's argument that federal law has pre-empted this field unpersuasive. While federal regulation of air travel is extensive; it is not exclusive. Quite the contrary federal law specifically preserves legal remedies for air travelers beyond those set forth in the Federal Aviation Act. 49 U.S.C. § 1506 provides that:

'Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.'

"This section recognizes that the statutory scheme established by the Federal Aviation Act is designed merely to complement existing statutory and common law remedies, not to supplant them. Moreover, it is clear that 49 U.S.C. § 1506 applies to remedies arising under state law as well as those created by federal law. [Citation.] Therefore, plaintiff's claims under both the common law of Pennsylvania and the Pennsylvania Unfair Trade Practices and Consumer Protection Law would

remain unaffected by this federal regulation of air travel.

". . . in these counts [Counts II and IV] of her complaint the plaintiff focuses on the advertising campaign conducted by TWA in connection with this special Pittsburgh to London offer . . . .

". . . . . .

" . . . In our view a distinction can be drawn between Counts I and III and Counts II and IV of the plaintiff's complaint. In Count I and III of her complaint the plaintiff challenges the manner in which TWA provided air service to her. In contrast Counts II and IV of the plaintiff's complaint focus on the manner in which TWA advertised this air service. These are, in our view, two distinct

> issues. TWA may provide a service which is wholly in accord with all applicable air tariffs yet still be liable to passengers if it has advertised that service in a misleading or deceptive manner. Therefore, we would not stay or dismiss these claims of fraud pending action by the Civil Aeronautics Board. (See Nader v. Allegheny Airlines, Inc. 426 U.S. 290, 96 S.St. 1978, 48 L.Ed.2d 643 (1975.)" Id., at 1345-1346.)

(See also, State By Lefkowitz v. Daro Chartours, Inc. (1979) 422 N.Y.S.2d 146, wherein the court gave short shrift to defendant's argument that because the Federal government regulates the airlines through title 49 U.S.C., it "preempts any state law affecting interstate airlines.")

In summary, from the language used by Congress in both the Federal Aviation Act of 1958 and the Airline Deregulation Act of 1978, from the interpretation of 49 U.S.C., section 1506 by the courts both before and after the 1978 Act, and from the underlying intent of Congress as set forth in 49 U.S.C. section 1506, to permit state laws which prevent misleading advertising to coexist with the federal government's exclusive jurisdiction over rates, routes and services, it is clear respondent's action is not preempted.

B. State Regulation Of Deceptive Advertising By Interstate Air Carriers Is Not An Impermissible Burden On Interstate Commerce.

Petitioner attempts to suggest state prevention of deceptive advertising would constitute an impermissible burden on interstate commerce. Petitioner argues it

could be subjected to conflicting determinations by various state regulatory agencies.

Petitioner fails to understand that the right to engage in interstate commerce does not create a corallary right to flout the laws of each state in which it does business. In Huron Portland Cement Co. v. Detroit (1960) 362 U.S. 440, this Court in response to a claim similar to petitioner's, stated:

> "State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." (Id., at 448; citations omitted.)

Petitioner does not suggest, nor is there any indication, that California's action to bar deceptive advertising by

petitioner is meant to discriminate against interstate commerce.

It should be noted petitioner is not the only enterprise engaged in interstate commerce which does business in California. The fact one is engaged in interstate commerce does not mean deceptive advertising practices by such businesses cannot be regulated by the state. Other enterprises which engage in interstate commerce are subject to the laws of the various states in which they do business. Petitioner is asserting that the possibility of inconsistent state laws mean it is not subject to any state laws. The absurdity of such a position causes petitioner's argument to collapse of its own weight.

The instant effort is not designed to impair the stream of commerce, but rather to keep it running pure. (Virginia

Pharmacy Board v. Virginia Consumer Council (1976) 425 U.S. 748, 771-772.) Petitioner should be held to that requirement.

C. Neither the Civil Aeronautics Board Nor the Department of Transportation Have Primary Jurisdiction Over Deceptive Advertising by Interstate Air Carriers.

Petitioner lastly asserts the effort by California to prevent deceptive advertising by it is barred by the doctrine of primary jurisdiction. This is largely a bootstrap argument in which an erroneous premise of federal preemption over deceptive advertising is utilized to reach an equally erroneous conclusion of primary jurisdiction.

Primary jurisdiction involves the concept of judicial abstention in cases where the protection of the integrity of a regulatory scheme dictates preliminary resort to a specific agency. (United

States v. Philadelphia National Bank (1963) 374 U.S. 321, 353.) Thus, in Texas and Pacific Railway Company v. Abilene Cotton Oil Company (1907) 204 U.S. 426, this Court found a common law action to recover charges paid in excess of what was just and reasonable should be set aside when the effect would be to frustrate the regulation of interstate rates by the Interstate Commerce Commission.

Unlike that situation, this action by California has nothing to do with either ratemaking or with determining what rates are fair. It is only concerned with deceptive advertising of rates established by the petitioner airline. As such, the doctrine of primary jurisdiction is inapplicable because the integrity of the federal regulatory scheme is not impaired by the prevention of deceptive advertising.

Petitioner has attempted to find primary jurisdiction, however, by arguing the terms "unfair or deceptive practices" and "unfair methods of competition," as used in 49 U.S.C., section 1381, encompass the instant action. These terms, in the context in which they appear, are primarily directed at antitrust activities.

Thus, in interpreting these terms, this Court, in a case relied upon by petitioner, Pan American World Airways v. United States (1963) 371 U.S. 296, quoted a Senate report to the effect:

> "'the committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial

competition.'" (Id., at pp. 306-307, quoting S.Rep. No. 597, 63d Cong., 2d Sess., p. 13.)

The Court noted the terms were governed by the standard of public interest as defined by Congress. (Id., at p. 308.) These standards were enunciated in section 102 of the 1958 Act and the Court noted they related to antitrust guidelines. (Id., at 309.) Thus, this section does not lend itself, as petitioner argues, to the interpretation Congress intended to preempt state regulation of deceptive advertising. Indeed, it does not even mention that subject.

The legislative history of the amendments to section 102 by the 1978 Act further demonstrates the Congressional focus:

"The revised statement . . . directs the Board to stress competition,

low-fair service, entry by new carriers, and avoidance of industry concentration. The Board is also required to develop programs to replace carriers holding unused authority and to develop a regulatory environment in which decision will be reached promptly. The Board is further directed to continue its program of strengthening smaller air carriers.

"The policy statement makes it clear that increased reliance upon competition must not result in any deterioration in safety." (1978 U.S. Code Congressional and Admin. News, pp. 3741-3742.)

This language reiterates the antitrust intention of the language relied upon by petitioner and undermines its argument that the intent of the terms used

in Section 1381 was to preclude state action against deceptive advertising.

The doctrine of primary jurisdiction is inapplicable to the prevention of deceptive advertising, and presents no basis for the grant of certiorari.

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CONCLUSION

Petitioner has failed to state special and important reasons for a review on writ of certiorari. Consequently, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No:

October Term, 1984

WESTERN AIRLINES, INC.,
a Delaware Corp.,

Petitioner,

v.

PEOPLE OF THE STATE OF
CALIFORNIA,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within Brief in Opposition to Petition for Certiorari to the California Court of Appeal, Fourth Appellate District, Division One as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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For Delivery to Hon. Wm. L. Todd

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 4 day of December, 1984.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, December 4, 1984.

Clifford E. Reed Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 4th day of December, 1984.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986